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No. 02-649

IN THE

Supreme Court of the United States

DEE-K ENTERPRISES, INC. and
ASHEBORO ELASTICS CORP.,

Petitioners,

v.

HEVEAFIL SDN. BHD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Warren Grimes
Professor, Southwestern
University School of Law
Senior Research Fellow
Albert A. Foer, President
American Antitrust Institute
2919 Ellicott Street, N.W.
Washington, D.C. 20008
(202) 244-9800

Robert A. Skitol*
David A.J. Goldfine
Drinker Biddle &
Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 842-8800
* Counsel of Record

Douglas E. Rosenthal
Sonnenschein, Nath & Rosenthal
1301 K Street, N.W.
Washington, D.C. 20005
(202) 408-6400

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Pursuant to Rule 36.1 of the Rules of this Court, amicus curiae the American Antitrust Institute ("AAI") respectfully moves for leave to file the accompanying brief as amicus curiae in support of petitioner. Petitioner has consented to the filing of the brief; however, counsel for respondent has denied consent.

INTEREST OF THE AMICUS CURIAE

AAI is an independent, non-profit education, research, and advocacy organization concerned with the integrity of antitrust enforcement. Its sixty-member Advisory Board includes four former Assistant Attorneys General for the Antitrust Division of the United States Department of Justice along with numerous distinguished practitioners, law professors, economists, and business leaders.[1]

According to the AAI's own website, its mission is to "increase the role of competition, assure that competition is fair, and challenge unduly concentrated power in the American and world economy." *See* www.antitrustinstitute.org. AAI believes that the decision below substantially undermines both private and government enforcement of the nation's antitrust laws against cartel activity that is harmful to American consumers. AAI perceives a serious danger in the message sent by the Fourth Circuit's decision in this case; namely that foreign-based price-fixing cartels are less susceptible to the reach of the nation's antitrust laws than domestic-based price-fixing cartels. That message is of great concern to the AAI, which instead believes that the nation's antitrust laws should be used to protect U.S. consumers against all price-fixing cartels foreign as well as domestic.

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[1] The members of the AAI's Advisory Board serve in a consultative capacity and their individual views may differ from positions taken by the AAI. None of AAI's Board of Directors nor any of AAI's Advisory Board members involved in preparing this amicus brief represents any party to this litigation.

For the foregoing reasons, the motion of AAI to file the accompanying brief as amicus curiae in support of Petitioner should be granted.

Respectfully submitted.

Warren Grimes
Professor, Southwestern
University School of Law
Senior Research Fellow
Albert A. Foer, President
American Antitrust Institute
2919 Ellicott Street, N.W.
Suite 1100
Washington, D.C. 20008
(202) 244-9800

Robert A. Skitol*
David A.J. Goldfine
Drinker Biddle &
Reath, LLP
1500 K Street, N.W.
Suite 1100
Washington, DC 20005
*Counsel of Record

Douglas E. Rosenthal
Sonnenschein, Nath & Rosenthal
1301 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 408-6400

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BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is described in the preceding motion for leave to file this brief.[1]

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[1] Pursuant to Sup. Ct. R. 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In a decision with serious consequences for the reach of the nation's antitrust laws against foreign-based cartels, the Fourth Circuit held that Sherman Act subject matter jurisdiction did not cover a foreign-based cartel with U.S. members that engaged in naked price-fixing on goods sold directly in and into the United States. This inappropriate refusal to invoke Sherman Act jurisdiction over classic per se illegal conduct affecting U.S. interstate and import commerce creates an intercircuit conflict and raises an antitrust jurisdictional issue sufficiently important to warrant this Court's attention.

But the importance of this case transcends that legal issue. The federal antitrust enforcement agencies have made clear their high-priority intent to apply Sherman Act jurisdiction over international cartels that sell to or otherwise affect U.S. buyers. Disagreement among the circuits about the scope and application of Sherman Act jurisdiction ensures that the current debate will go forward until it is resolved by this Court. The Court should review the case to bring greater clarity and certainty to this increasingly important aspect of antitrust jurisprudence.

ARGUMENT

I. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE TO ANTITRUST LAW

The unsettled questions presented here bear directly upon the reach of Sherman Act jurisdiction over "mixed" national-international cartel activity, which is exceptionally important to the administration of the U.S. antitrust laws in today's global marketplace. International cartels affect tremendous volumes of commerce in the United States. Assistant Attorney General Charles James recently noted the importance of the federal government's continued "success in rooting out international cartel activity, affirming our government's role to protect American consumers from unlawful cartels wherever they base their operations or conduct." *See Recent Developments And Future Challenges At The Antitrust Division*, Remarks by Charles A. James Before The Dallas Bar Association at 7 (September 17, 2002) (www.usdoj.gov/atr/public/speeches/200239.htm).

Assistant Attorney General James also noted the government's clear intention to rely heavily on the full breadth of Sherman Act jurisdiction in order to "send a powerful and unmistakable deterrent message to those around the world who would victimize American consumers and the American marketplace." *Id.* In fact, as the current Deputy Assistant Attorney General for criminal antitrust enforcement has observed, since 1997, the Antitrust Division has obtained over $1.7 billion in fines – many multiples higher than the sum total of all fines for Sherman Act violations dating back to 1890. *See*

Presentation on International Cartel Enforcement, Presentation by James M. Griffin To The American Bar Association at 2 (March 28, 2001) (www.usdoj.gov/atr/public/speeches/8063.htm). Well over ninety percent of these fines were imposed in connection with the prosecution of international cartel activity. *Id.*

Former Assistant Attorney General Joel Klein, much like his successor, noted the exceptional importance of having the necessary tools – jurisdictional and otherwise – to enforce the nation's antitrust laws against international cartels because "people all over the world have come to realize that cartels, and particularly international cartels are a true scourge of the world economy." *See The War Against International Cartels: Lessons From The Battlefront*, Remarks by Joel A. Klein at Fordham Corporate Law Institute 26th Annual Conference on International Antitrust Law & Policy at 1 (October 14, 1999) (www.usdoj.gov./atr/public/speeches/3727.htm). As both former Assistant Attorney General Klein and Professor Areeda have observed, the United States does not stand alone in its views. In fact,"the competition law of the European Community abhors a 'naked' cartel about as much as does United States law." Areeda, *supra*, at ¶ 371 (internal citations omitted); *accord*, Klein, *supra*, at 1.

In short, the federal antitrust enforcement agencies have made clear their intent to push for far-reaching application of Sherman Act jurisdiction over international cartels. Disagreement among the circuits about the scope and jurisdictional reach of the Sherman Act over cartels with foreign aspects threatens this enforcement effort. This Court should resolve this important antitrust jurisdictional issue once and for all.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH A DECISION OF THE THIRD CIRCUIT THAT FLATLY REFUSED TO APPLY THE *HARTFORD FIRE/ALCOA* TEST TO MIXED DOMESTIC AND FOREIGN CONDUCT

1. The Fourth Circuit's decision is in conflict with the decision of another court of appeals that flatly refused to apply the *Hartford Fire/Alcoa* effects test for Sherman Act subject matter jurisdiction to mixed foreign and domestic conduct. Unlike the Fourth Circuit in this case, the Third Circuit refused to apply the *Hartford/Fire Alcoa* test concluding instead that that jurisdictional test was reserved for "wholly foreign" conduct but nothing else. *See, e.g., Carpet Group Int'l v. Oriental Rug Ass'n.*, 227 F.3d 62, 65 (3d Cir. 2000).

The Fourth Circuit essentially acknowledged the conflict with the Third Circuit in *Carpet Group* by resting its contrary ruling on the fact that the Third Circuit's decision was not binding and did not "change" its obligation to follow this Court's precedent in *Hartford Fire*. 299 F.3d at 290-91. The Fourth Circuit's half-hearted efforts elsewhere to distinguish *Carpet Group* on the ground that that case involved "primarily domestic" but nonetheless mixed conduct fell far short. To begin with, the mixed conduct challenged in *Carpet Group* like the mixed conduct challenged here involves some domestic as well as some foreign elements. In both cases, the fundamental question is whether the domestic conduct is enough to invoke Sherman Act jurisdiction over foreign conduct that is part of the same conspiracy. In such cases, either the *McLain* effects test applies, as in *Carpet Group*, or else the more burdensome *Hartford Fire* effects test applies, as the Fourth Circuit saw it. Simply put, the Third Circuit's decision in *Carpet Group* and the

Fourth Circuit's decision in this case cannot be squared with each other.

In a misguided attempt to justify creating a conflict, the Fourth Circuit sharply criticized the *Carpet Group* Court for misapprehending this Court's decision in *Hartford Fire*. 299 F.3d at 291. In the end, the Fourth Circuit rested not on distinctions but on the ground that *Carpet Group* was wrongly decided because it misunderstood *Hartford Fire*. As shown below, however, it is the Fourth Circuit that is out of step, not the Third Circuit in *Carpet Group*. The conflict warrants review.

2. The Fourth Circuit's decision rests on its assessment that the *Hartford Fire/Alcoa* effects test is not limited in its application to wholly foreign conduct. The Fourth Circuit could not have been more wrong.

Both the First and Third Circuits have concluded quite correctly that the *Hartford Fire/Alcoa* effects test applies to wholly foreign conduct but nothing else. *See, e.g., Carpet Group*, 227 F.3d at 75 (*Hartford Fire/Alcoa* effects test applies only to "wholly foreign conduct"); *United States v. Nippon Paper*, 109 F.3d 1, 9 (1st Cir. 1997) (*Hartford Fire/Alcoa* effects test applies only to "wholly foreign commerce"). In fact, that was exactly the winning argument made by the government in *Nippon Paper* and *Carpet Group*. *See, e.g., Brief For United States Of America in Nippon Paper* at 26 (under a "straightforward application" of the *Hartford/Alcoa* test, it applies only to "conspiratorial conduct undertaken wholly abroad"); *accord, Brief For Amicus Curie United States of America in Carpet Group* (cited in *Carpet Group*, 227 F.3d at 74-75).

As the petition explains, the Fourth Circuit concluded that, simply because one of the three conspiracy counts in *Hartford Fire* involved some domestic conduct, the

Hartford Fire/Alcoa effects test applied in all primarily foreign cartel cases like this one. *See* Pet. at 11. In *Hartford Fire*, however, this Court merely observed in passing that the district court "undoubtedly" had jurisdiction over the plaintiffs' Sherman Act claims "as the London reinsurers apparently concede." 509 U.S. at 795. This Court nowhere adopted the sweeping rule adopted by the Fourth Circuit here, namely that the *Hartford Fire/Alcoa* effects test is mandatory in all primarily foreign cartel cases. As the Areeda & Hovenkamp treatise strongly suggests, it is dubious that *Hartford Fire* supports the Fourth Circuit's novel view. *See* IA, Areeda & Hovenkamp, *Antitrust Law*, ¶ 273 ("Indeed, the parties presented no jurisdictional issue to the Court in *Hartford Fire;* rather, the defendant reinsurers 'concede[d]' jurisdiction, but contended that 'the District Court should have declined to exercise jurisdiction under the principle of international comity'").

3. The Fourth Circuit's decision is fundamentally flawed in several respects. First, if allowed to stand, it would seriously jeopardize the government's ability to prosecute foreign-based cartels for price-fixing or other per se unlawful conduct adversely affecting U.S. consumers. At least since *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the price-fixing activity of a cartel has been a per se violation of Sherman Act Section One. Especially when a foreign-based cartel sells goods or services directly in and into United States markets, this Court has long recognized that the Sherman Act applies regardless of whether the cartel activity occurs primarily within the United States, *see United States v. Sisal Sales Corp*, 274 U.S. 268, 274 (1927), or outside its borders, *see Hartford Fire*, 509 U.S. at 769.

Until the Fourth Circuit's decision in this case, Sherman Act coverage over foreign-based cartels depended solely "upon effects felt within the United States" but the "locus of conduct" did not matter at all. Areeda, *supra*, ¶ 272 at 351. For example, almost 100 years ago in *United States v. American Tobacco*, 221 U.S. 106 (1911), this Court concluded that there was Sherman Act subject matter jurisdiction over foreign corporations that refused to sell in the United States in competition with American tobacco producers noting that the conspiracy there charged violated the Sherman Act, "including the foreign corporations in so far as by the contracts made by them they became co-operators in the combination." 221 U.S. at 184. The contracts to which the foreign corporations were parties had been executed in England. *Id.* at 172.

Yet the Fourth Circuit required more than just effects on U.S. commerce to establish Sherman Act subject matter jurisdiction over a foreign-based cartel. It also weighed additional factors including national affiliation, the location of the conduct, and the effects of the conduct on worldwide commerce beyond U.S. commerce. That is not consistent with virtually all of the major litigated international restraint cases decided by this Court which looked to the effects on United States commerce but nothing else. *See, e.g., Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *American Tobacco*, 221 U.S. at 184; *United States v. Holophane Co.*, 119 F.Supp. 114, *aff'd per curiam*, 325 U.S. 903 (1956).

The Fourth Circuit's unprecedented decision marks the first time a court has found no Sherman Act liability in the face of proof of a foreign-based cartel that fixes the prices of goods sold directly in the United States. The Fourth Circuit's decision produces the perverse and unwarranted result of allowing price-fixers selling

directly into the United States to avoid the reach of the Sherman Act altogether simply by holding meetings outside the United States, conspiring to fix prices not just in the United States but in other parts of the world as well, and acquiring their products from non-American sources. The misguided jurisdictional analysis utilized by the Fourth Circuit here indefensibly discriminates in favor of foreign-based price fixing cartels selling in U.S. commerce while leaving domestic-based price fixing cartels subject to the full coverage of the Sherman Act. This Court should not allow public and private prosecutions against foreign-based cartels to be so seriously weakened. *See, e.g., Reiter v. Sonotone Corp. et al.*, 442 U.S. 330, 344 (1979) ("private [antitrust] suits provide a significant supplement to . . . enforcing the antitrust laws and deterring violations").

4. The Fourth Circuit's decision seriously undermines the bedrock principle that the nation's antitrust laws are designed to protect U.S. consumer welfare. This is because the Fourth Circuit considered factors which have nothing at all to do with the welfare of U.S. consumers: the location of the meetings outside the United States, the foreign nationality of the cartel participants, and the worldwide reach of the price-fixing conspiracy beyond the United States. The Fourth Circuit simply failed to grasp that it is the effect of the conduct on U.S. consumers that ultimately matters above all else under the Sherman Act. To say the least, it is the height of irony for a U.S. purchaser's right of recovery, or the government's prosecution, to turn inversely on how big and successful the cartel is outside the United States. For example, in a case like this one involving approximately $60 million in U.S. sales by the co-conspirators, it simply should not make any difference at all whether the non-U.S. cartelized sales are $6 million, $60 million, or $600 million – U.S. consumers are

harmed exactly the same by the foreign-based cartel's price-fixing regardless of the amount of non-U.S. cartelized sales. Yet under the Fourth Circuit's flawed analysis this makes a world of difference.

5. The Fourth Circuit's decision also unwisely resurrects a flawed "balancing" analysis of a type this Court rejected in *Hartford Fire*. In *Hartford Fire*, this Court reaffirmed the *Alcoa* effects test stating that "it is now well established that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. at 796. The Fourth Circuit's balancing test for Sherman Act jurisdiction is plainly inconsistent with *American Tobacco* as well as *Hartford Fire* which saw no need for balancing once the requisite commercial effects are established. Furthermore, as the petition explains, the Fourth Circuit's balancing test is rife with problems. *See* Pet. at 18-19.

6. In the AAI's view, the Fourth Circuit should have applied the *McLain* effects test rather than the *Hartford Fire/Alcoa* effects test for Sherman Act subject matter jurisdiction. Under the *McLain* test, a price-fixing plaintiff must demonstrate only "that the defendants' activity is itself in interstate commerce" or "'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved.'" *McLain v. Real Estate Bd.*, 444 U.S. 232, 242, 246 (1980) (*quoting Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 745 (1976)). As the Areeda treatise explains, this "effects test can generally be established simply by showing that the naked price-fixing exists and that a substantial number of sales were made to United States buyers." Areeda, *supra*, ¶ 273 at 371. That is exactly the case here. Respondents directly fixed prices for the sale of rubber thread in the United States market and sold

approximately $60 million dollars worth directly to U.S. interstate and import buyers through their agents and co-conspirators.

7. In any event, the Fourth Circuit should have found Sherman Act subject matter jurisdiction even under the *Hartford Fire/Alcoa* test. The Fourth Circuit failed to grasp that "*Alcoa* itself did not actually hold that significant or any other effects were a prerequisite to Sherman Act coverage, once an intention to affect United States commerce was established." Areeda, *supra*, ¶ 272f at 354. As the petition correctly points out, where, as here, intent to affect the United States is proved, the *Alcoa/Hartford Fire* test does not require that plaintiffs establish a substantial effect on commerce, but rather puts the burden of showing no effect on commerce on defendants. *See* Pet. at 11. The Fourth Circuit, however, put no such burden on respondents.

8. The Fourth Circuit's decision is not just inconsistent with this Court's decisions in *Hartford Fire* and *Alcoa*, it is also out-of-step with the views of the federal government antitrust enforcement agencies. For example, the Department of Justice and Federal Trade Commission Guidelines even claim jurisdiction over a foreign cartel that makes no sales into the United States directly but that sells to an intermediary with the knowledge that the latter intends to resell into the United States. *See Revised Antitrust Enforcement Guidelines for International Operations*, § 3.13 (1995). The DOJ and FTC Guidelines also express the view that in the case of a foreign cartel with substantial sales into the United States, Sherman Act "subject matter jurisdiction is clear under the general principles of antitrust law most recently expressed in *Hartford Fire*." *Id.* at § 3.11. Yet the Fourth Circuit took the opposite view in this case, allowing a jury to opine on whether $60 million was

substantial compared to the effect of other factors such as the antitrust dumping laws.

This Court should grant the petition to clarify the implications of its embrace of *Alcoa* in *Hartford Fire* and to bring the Fourth Circuit into line with the views of the government and the Third Circuit in *Carpet Group*.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted.

Warren Grimes
Professor, Southwestern University School of Law
Senior Research Fellow
Albert A. Foer, President
American Antitrust Institute
2919 Ellicott Street, N.W.
Suite 1100
Washington, D.C. 20008
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